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IN THE  
SUPREME COURT OF THE  
UNITED STATES

October Term, 1945

No. 1154

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BASIL B. CRAMPTON,  
*Petitioner,*

vs.

CRAMPTON MANUFACTURING COMPANY,  
*Respondent.*

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN



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TO THE HONORABLE THE CHIEF JUSTICE AND  
ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF THE UNITED STATES:

The brief for Respondent asserts that the Sixth C.C.A. held fact finding No. 11 clearly erroneous. If it did, it was in obvious error. If such error is immune to correction, Rule 52(a) is open to complete disregard by any Federal C.C.A. at will.

There is ample evidence in the record, necessarily referred to in the petition, to substantiate the trueness of the fact findings of the District Judge who tried the case and observed the witnesses and their demeanor.

As pointed out in petitioner's brief, the transcript clearly shows, as previously established, *too very old environments*.

In the final assemblies of petitioner's and respondent's handle and lever structures the off-set levers, each including a handle, inside lift arm and transverse "off-set rock shaft", or "spindle", or "extension", were both

initially divided, one at one end of the extension, (or spindle, or rock shaft), and the other at the other end for slipping the spud thereover. Both were old.

Therefore, there was no inventive step in connection with either of these old environments. The inventive step was something else.

Obviously and without question there was a change in structure over the prior art, by which the virtues of simplicity, durability, compactness, ease of mounting and economy were greatly increased over the earlier structures; and the inventive step is the same whether applied by permanently securing a handle at the outer end of the spindle (or "extension") which was integral with the inside lift arm, or whether it was done by securing the inside lift arm permanently and inseparably to the end of a spindle integral with the handle; and with both, provide a compact limiting rocking stop, and also an axial movement stop, as defined in claims 11, 12 and 13, to get such simplicity, ease of mounting, durability, economy, etc.

There is no question of a very marked, meritorious improvement having been made, establishing the *validity* of the patent, as expressly held by both lower courts.

If the Sixth C.C.A. did set aside fact finding No. 11 of the lower court, it has violated the provisions of rule 52(a). The Sixth C.C.A. does not expressly state anything about such fact finding 11, though in other parts of its decision, it refers to the lower court having found several meritorious features in the Crampton invention based on structure and that Theleen was not the Crampton invention, and it also expressly reaffirms the several virtues of the Crampton improvement which the lower court stated in its opinion, and further, substantially expressly affirms the fact finding 7 of the lower court's findings.

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We set forth the proposition that if the court did not expressly disregard such fact finding 11, or overrule it, contrary to rule 52(a), it must, not probably, but inevitably, have decided the case contrary to the applicable decisions of the Supreme Court.

What is not understandable in connection with respondent's brief, is that he states that the Sixth C.C.A. held the Crampton patent did have a limited range of equivalents, and then supports a decision which gives no equivalents, and according to which there could be no departure, colorable or otherwise, notwithstanding two directly old equivalent handle and rocking lever structures, divided initially, one at one end, and the other at the other end of the offset rock shaft intermediate portion to which the invention is and has been applied. And has supported the proposition of the Sixth C.C.A. of non-literal conformance of the words of the asserted claims on the infringing structure.

We are certain the words of the claims do literally apply, and have fully set forth the reasons for it in the petitioner's main brief. Surely the inside lift arm of the Pleasant patent et al in its permanent and secure and, in effect, integral connection with the spindle provides in substance the lever having the inside lift arm 5 of Crampton with its lateral extension 18, as a literal fact.

But what is of much greater importance than any fortune of the petitioner herein, is the question of whether or not, close copying with entire attainment of the virtues of economy, simplicity, compactness, etc. is done, by minor and significant colorable departure, taught by the prior art as an old environment, should be permitted, upon any basis of establishing a rule that mere narrow literalism controls. This is a question which has appeared in many decided cases, both in the Supreme Court and in the lower courts, and which Judge Denison of the Sixth C.C.A., years ago, completely and thoroughly analyzed. The apparent but not actually opposed decisions of the Supreme Court are set forth and a basis of clear distinction found in *D'Arcy v. Marshall Vent. Mattress Co.*, 259 Federal 236. Matters relating to old environment are not literally controlling, but instead, words of the claims directed to the *inventive step* control. Several cases of this Court of one type, and others of the other type, were analyzed and the reasons pursued why a literal application under some circumstances was followed and not in others. Where the words of the claim pertain to the *inventive step* which imports substantial functions, such words are literally en-

forced. But in both kinds of cases it is substantial identity in respect to the actual invention which rules.

The Sixth C.C.A. in this present case has attempted, we think by reasoning closely approaching sophistry, to say that, literally, the lever of the respondent's structure does not go through the base (spud) though unquestionably, in the assembled structure of respondent, there is an inside lift arm, having a permanent assembled connection therewith of the element, "spindle" or "offset rock shaft" or "extension", going through the base and having a permanent connection with the handle. We think and have strongly asserted proper application of the terms of the claims to the respondent's structure. But we further think, that it is an exceedingly important question, to all improvers or creators of new things, whether their inventions may be unblushingly appropriated, under cover of protection by the judiciary of this country, based on any such narrow illiberal bare word interpretation that the Sixth C.C.A. advanced, and with such interpretation carried to as far an extreme of literalism as is possible. And, further, if such Sixth C.C.A. was correct, as to literalism as a fact, that such fact would be controlling. It has violated its own enumerated principles stated in *D'Arcy v. Marshall*, *supra*.

There had never been previously any *permanent*, simple durable, compact, unit installed, economical flushing tank lever and handle assembly prior to Crampton. The statement with regard to Theleen at the bottom of page 4, continued on to page 5 all respondent's brief, is denied in the decisions and fact findings of *both* lower courts.

Moreover, the case largely relied upon by the petitioner, namely, *Sanitary Refrigerator Co. v. Winters, et al*, 50 S.C.T. 9, involved claims which were wholly *impossible to read literally* on the accused structure which this Court held did infringe. It is easy to get away from the literal claim, predicated on the best mode of embodying an invention, by reversing parts, which any mechanic can and does do, retaining every function, result, advantage, and benefit; and in some cases with slight impairing still getting most of the benefits. It is an invitation to infringe with impunity.

If the inventors of this country are to be subjected to such injustice, the quicker they find it out, the better. Also, the quicker small businesses started and sustained by patents will be finished, and actual monopoly of all of the industrial business of this country will pass into the hands of or under the control of a relatively few gigantic organizations.

\* \* \*

We think that it is for the Supreme Court of the United States, as the ultimate supervising authority, to exercise its power of review in a case like the present one, not for any benefit of the petitioner, Crampton, but in the interests of the whole country and the encouragement of advances in the mechanic arts.

For if it does not do so, it must inevitably cause those who do advance the mechanic arts to feel that all an infringer has to do is make a minor change, and drastic, and destructive narrowing in an illiberal spirit will be brought against him when he attempts to assert his property rights in his invention. That is a matter of correcting the subordinate judiciary, in the present case, where the Sixth C.C.A. has "so far departed from the accepted and usual course of judicial proceedings", that it has either violated rule 52 (a); or has decided one of the most controlling questions of the patent law relating to infringement in obvious conflict with the applicable decisions of this Court.

\* \* \*

Crampton is an inventive genius in decreasing costs and producing greatly simplified and more durable things, and has proved it for more than 35 years continuous activity. His fortune is not dependent upon this patent case at all. In fact, the business has now been sold and taken over by a small corporation. He has all ready improved the present flushing tank lever in economy, and the new management running the business is about to market such new lever at a lower price with profit. As a matter of fact, an inventive genius does not need much in the way of patent protection, for though infringers may appropriate, they are always behind, and while they can copy what they can see they can not copy the mind, as truly stated in a familiar quotation from one of Kipling's poems.



But there are others who make valuable improvements which sustain or start small businesses, who do need patent protection, and need as liberal a treatment with regard to their property rights in patents as others in connection with their property rights of a different type.

It is believed that valid patent property and one of great merit, under the doctrine of, *Eibel Process Company v. Minnesota and Ontario Paper Co.*, 43 S.C.T. 322, has not yet been totally destroyed; but if it is to be, we believe it is a duty which the Supreme Court owes to this country to say that the Eibel Process case doctrine is no longer valid. For in this case, the *validity* of the patent is sustained by both lower courts, and the *virtues* of the improvement are recited by both courts in express terms. If an infringer can so closely copy, as in this case, and after such infringer in settling an account against it, sold back to Crampton all of his rights under the patent (fact findings 9 and 10), those who have devoted their lives to the obtaining and sustaining of the rights of those who have made valuable inventive improvements, must inevitably conclude that the more than a century old encouragement of the advancement of the mechanic arts and sciences has now been changed into a discouragement of them.

The lower court Judge who heard this case, saw the witnesses and heard their testimony, Judge Raymond, recently deceased, was of outstanding ability and universally recognized as among the most capable in the Federal Judiciary. His fact findings in this case are certain, sure, and absolutely correct. His application of the decisions of this Court was sound and correct. The Sixth C.C.A. erred unquestionably in reversing his finding of infringement.

It is realized, of course, that perfection in a final decision is not necessarily required and, particularly if it affects only the litigants. But where it goes farther and affects the whole patent protection system, then we believe a decision of the kind that was handed down by the Sixth C.C.A. in this case, as a matter of great public interest, does require its review and correction by the final ultimate Court of this country.

## SUMMARY AND CONCLUSION

According to respondent's brief, and as one of the reasons for asking for the grant of the writ by petitioner, the Appellate Court did overrule, or vacate, or hold clearly erroneous fact finding 11 of the District Court. This fact finding was made by a District Judge of highest ability and exceptionally long experience, who heard every word of every witness, and carefully reviewed every exhibit. And, of course, as repeatedly stated, the only difference was that the part of the structure of the patent and of the respondent's devices, which include specifically, the outside handle, the inside lift arm and the cross connecting portion, called variously "extension", or "spindle" or "offset rock shaft", and which are in every effect, integral from one end to the other, initially in their manufacture, were divided between their ends, one at one end of this "offset rock shaft", and the other at the other, both very old. The spud could be slipped over the rock shaft, in both. In the patent, it was at one end, and in the infringing structure, at the <sup>other</sup> end of such "extension", "spindle", or "rock-shaft". The final securing together made, in both, a permanent, and in effect, integral connection, so that this rocking lever member, operated by the handle, was the same identically in both completed structures.

Does a Circuit Court of Appeals, under such circumstances, have any license to determine that fact finding 11 of the lower court was clearly erroneous? We do not think so and we submit that the Supreme Court of the United States should clearly intervene and review this case.

If, on the other hand, the Sixth C.C.A. did accept all the fact findings of the District Court, then it must have accepted fact finding 11 along with the rest. Such a fact finding requires the same conclusion that was reached in *Sanitary Refrigerator Co. v. Winters, et al, supra*, and the conclusion reached by the Appellate Court must be necessarily erroneous as a matter of law.

Validity is not a question. It is wholly unimportant herein whether or not some lower courts and some judges of them have stated that the Supreme Court of the United States has raised the standard of invention. Whether or

not this is true, the patent in question, of such merit that it immediately and promptly superseded everything in its field, has been expressly held *valid* by both lower courts and, certainly, this Court accepts that conclusion in accordance with two of its most recent patent cases: *Goodyear Co. v. Ray-O-Vac Co.* and *Williams v. United Machine Corp.* both cited in petitioner's main brief. A patent of this type held valid, and so highly meritorious that it immediately supplanted and superseded everything else in its field, is not to be struck down by either attempted narrow literalism or other destructive narrow interpretation. To do so is to violate unconscionably the applicable decisions of this Court. Particularly is this true, when all courts have conceded that the patent should have a limited range of equivalents.

Finally, if a Circuit Court of Appeals, wholly erroneously, and so far as this case is concerned, incompetently did hold fact finding 11 of the District Court clearly erroneous, then rule 52(a) might just as well be erased; that is, if the Supreme Court will not examine and determine which of the two lower courts was right as to facts stated in fact finding 11. For if the Supreme Court refuses such examination, it merely has licensed Circuit Courts of Appeals to do as they please with the fact findings of a lower court, as, under such circumstances, any Circuit Court of Appeals can do as it wants without chance of review; and such rule 52(a) become a dead letter.

Throughout all briefs for petitioner in this proceeding, we have asked for consideration of a patent as *property*, and the Crampton patent having been held *valid*, it is established that it is legitimate property, differing from no other property, and having due to it the same protection as all property, in accordance with *Cammeyer v. Newton*, 94 U. S. 255; 24 L. Ed. 72, and *Rohmer, et al v. Commissioner of Internal Revenue*, 68 U.S.P.Q. 433, (Second C.C.A.) as follows:

(3) "The 'property' of the owner of a copy-right (like that of a patentee), because of his 'monopoly' power, is sometimes thought to be utterly different from other kinds of property. But his 'monopoly' power is not markedly distinct from that of owners of

other sorts of 'property'. For it is of the essence of 'property', generally that its owner has the right, enforceable by court action, to *exclude* others from its use, absent his consent; and that power to exclude is what 'monopoly' ordinarily means."

Very respectfully,

FRANK E. LIVERANCE, JR.,  
*Attorney for Petitioner.*

Grand Rapids, Michigan  
April 22, 1946.